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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 80.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY, OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

I.

Competence of the Pilot.

Since the petitioners' reply brief argues this question further, three comments should be briefly made.

1. No question on this subject is presented by the record. The Commissioner found (R. 535) that the *Isis* sailed "under the direction of a properly selected local pilot." No exception was taken to this finding in the District Court.

No error was assigned in this respect in the Circuit Court of Appeals. Therefore, it is submitted, the question is not raised on the record. The argument now suggested by the petitioners seems an afterthought.

2. It is not clear what greater care could have been exercised in selecting a pilot than to take one familiar with the ship, of long experience on the river, and recommended by the Chief Pilot as the best man for the purpose (R. 161). The fact that the pilot has since died made it impossible to call him to give further details of his experience.

3. It is suggested that the earlier accident to the steamer indicated that the pilot was not competent. There is not a word of evidence tending to show that he was responsible in any way for the first accident. Since that accident was not an issue in the present case, it was not gone into in any detail in the evidence, but the Seeamt (R. 476) found that it was unavoidable, and that "no fault attaches to anyone."

II.

The Findings Below as to the Rudder.

The petitioners say (reply brief, p. 9) "There is certainly no finding below that it" (the bend in the tip of the rudder) "did not physically contribute to some extent." This statement, it seems, is directly opposed to the findings below. The Commissioner said (R. 512):

> "If there was any bend in the rudder or anything else which affected the steering of the *Isis*, it would seem obvious, and the expert evidence is, that any competent navigator could not fail to have discovered some indication of it by the time the vessel had gone half a mile or at least had reached her full towing speed of 7 or 8 kilometers."

At R. 513, he finds that the engine movements on the *Isis* supported the direct evidence from her officers that there was no tendency to sheer on the way down the river.

At R. 533, he finds:

> "The injury consisting of a 5° set in the rudder blade was not a contributing cause of the second stranding."

At R. 516, he finds that "unseaworthiness, if any, in respect of the steering gear of the *Isis* did not cause or contribute to the stranding."

At R. 525, he finds that the deflection in the rudder blade, if it existed, did not render the *Isis* unseaworthy.

At R. 534, he finds that she was seaworthy, whether or not the deflection then existed.

The District Court confirmed these findings in its opinion (R. 545, 546) and in its formal order (R. 547).

The Circuit Court of Appeals said (R. 561):

> "The bend in the rudder was found to be about 5° and, assuming that this existed due to the first stranding and was not repaired at Bremen, still it would not account for the second stranding * * * before the Commissioner, where both parties had full opportunity to examine, it was established that it had no effect upon the navigation of the vessel. If there were a bend in the rudder the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. * * * It was expressly found that unseaworthiness, if any, with respect to the steering gear of the vessel, did not cause or contribute to this second stranding."

Throughout, the petitioners argue as though the whole rudder had been bent 5°. It should therefore be emphasized that it was only the lower *tip*, and, as argued in the respondent's principal brief (pp. 26-28), it is probable that this bend occurred at the second stranding. Even if it was present when the *Isis* left Bremen, no one can seriously suggest that it would have had any practical effect; and the findings below on this subject are supported by overwhelming evidence (Respondent's principal brief, Appendix B, VII to X).

The reply brief says (p. 9) that the Seeamt "is not analogous to our local Inspectors, but is a Court of Admiralty." Evidently the petitioners have overlooked the agreement on this subject appearing at R. 207, as follows:

> "It is further agreed that the Seeamt is not a Court for the determination of litigated controversies, but is a body created to investigate marine disasters with certain disciplinary powers."

This, it is submitted, is precisely analogous to our Local Inspectors.

That the Seeamt confused the trip up the river with the trip down is sufficiently argued at pages 35-36 of the respondent's principal brief. The findings below sustain the respondent's position on this subject. The inaccuracy of the Seeamt's report in this and other respects may be explained by the fact that it appears to have been a rough draft "its phraseology subsequently to be put into a more definite language." (R. 468.)

III.

The Harter Act.

1. Undoubtedly there is a difference of opinion in the Second Circuit Court of Appeals on the subject of causal relation. The three judges who sat in the *Louis Dreyfus* case hold one view. The three who sat in the case at bar hold another. The latter view has also the support of Circuit Judge Ward, who decided the *Turret Crown*, 282 Fed. 354, in the District Court as well as of the three judges who decided that case on appeal (297 Fed. 766) and of those who decided the *Thessaloniki*, 267 Fed. 67, and the *Spartan*, 47 Fed. (2d) 189. (Respondent's principal brief, p. 58.)

2. The petitioners admit (reply brief, pp. 2, 3) that unseaworthiness not causing damage is immaterial in cases of contractual agreements for exemption from liability, as well as in cases of suit for breach of warranty of seaworthi-

ness. This result in reasonable and in consonance with general principles of law. What justification is there, then, for applying different principles to the Harter Act, which was intended to "render such agreements unnecessary" (the *Jason*, 225 U. S. 32, 53)?

3. The petitioners do not meet the suggestion that their construction of the Act leads to absurd and unjust results. They say that Congress has conferred a privilege and may impose such conditions as it sees fit. But Congress must have intended those conditions to be reasonable and not "whimsical." If the sea damages cargo by leaking through a crack in a hatch which was present because of the owner's failure in initial diligence, it is reasonable that the owner should not have the protection of the Harter Act; but of the question is one of error of navigation producing collision, it would be absurd that the crack, which has nothing to do with the case, should affect the result. It is, of course, to be understood that the question under discussion relates to defects which *in fact* do not cause the damage.

4. As previously suggested (respondent's principal brief, p. 49), the question does not seem to arise here. The Harter Act had no new application to the ship at Bremen. Even if an error of management was made there, and even if, for some reason, that error was not within the shield of the Harter Act, it is established that that error did not cause or contribute to the accident, and that, it would seem, disposes of the case.

JOHN W. GRIFFIN,
Counsel for Respondent.

HAIGHT, SMITH, GRIFFIN & DEMING,
Proctors for Respondent,
27 William Street,
New York Cty.